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January 8, 1951

Op. No. 51-6 ✓

Honorable Wes Polley  
Cochise County Attorney  
Bisbee, Arizona

Dear Wes:

This is in reply to your question contained in your letter of December 12, 1950, but may incidentally help in the answer to the County School Superintendent's question. Your question is:

" \* \* \* I am interested in the question as to whether or not the employee may force the payment of wages or salary due even though the appointment was illegal under the holding in Juliani v. Darrow, 58 Ariz. 296 (Arizona), 119 P. 2d 565. \* \* \* "

Your question is so general that we find it somewhat difficult to give a direct opinion because so often matters of this kind, as you know, are determined on the fact in each individual case. You will note that under Parts 3 and 4 of the Juliani v. Darrow case, supra, the court had this to say:

"Plaintiff contends, however, that even if the position of town attorney of the Town of South Tucson was a public office and he was ineligible to occupy it because of his non-residence, he became under the circumstances a de facto officer and as such was entitled to the salary the office carried, and we think this position is sound. \* \* \* " (Emphasis supplied)

Judge McAlister then cited a great many other cases and authorities along this line and particularly 46 C.J. 1056, Section 370, and 93 ALR 258. Each of these citations has been enlarged upon. The Corpus Juris citation has been enlarged upon by paragraphs 145 and 146, page 446 of 67 C.J.S. but the principle enunciated in 46 C.J. under the general heading "De facto Officers" commencing at page 1053 has not been changed. In this connection we would like to cite a small portion of the wording of 46 C.J., supra, and a case or two cited therein. Reading from Section 370, 46 C.J., page 1056, the compiler says this:

"Acting although Ineligible or without Qualification. Persons having color of title may be regarded as de facto officers, even though legally they are not eligible for the position. One elected or appointed to an office, who has failed to take the oath required, or to execute his bond within the time prescribed, or whose bond is irregular, is at least a de facto officer so that his acts are valid as to the public. Conversely, the fact that one whose election was absolutely void is permitted to take the oath and to give bond adds nothing to his rights, and he merely becomes a de facto officer. The color of title under which a person becomes a de facto officer must be fair. Thus a person cannot become such an officer where he failed to take the oath and give the bond for the purpose of evading the constitutional provision against holding two offices. But one who has qualified for a second office and takes possession of the office and discharges the duties thereof is not prevented from becoming an officer de facto by reason of the fact that at the time of his election or appointment he was the incumbent of another office and was disqualified from holding two offices. Where there is no record of qualification as required by statute, the incumbent of the office is only a de facto officer."  
(Emphasis supplied)

The Supreme Court of the State of Illinois in the case of Howard v. Burke, 93 N.E. 775, gives us this definition:

"Color of title to an office has been defined to be 'that which in appearance is title but which in reality is no title'. . . . Color of authority (which is usually considered synonymous with color of title) to an office is held to be authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer."

Judge McAlister in the Juliani case, supra, commented as follows:

" \* \* \* It is sufficient to say that it has been held for many years in this state that a de facto officer may recover the salary attached to office when there is no de jure officer claiming it."

It appears to us that if the individual appointed was in good faith and his appointment was fair that he would become a de facto employee and unless there was a de jure individual claiming the office that under the Juliani case such employee could recover the salary incident to the office or employment held. In this connection we would suggest that you read the annotation in 93 ALR 258 and 151 ALR 952, together with C.J. and C.J.S. citations wherein we think contains ample law to determine the rights in most any given case.

Yours very truly,

FRED O. WILSON  
Attorney General

CHAS. ROGERS  
Assistant Attorney General

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